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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

JOHN T. SCOTT, III
(202) 624-2582

November 4, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: MM Docket No. 93-260

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of VideoIndiana, Inc., licensee of Station WTHR(TV), Indianapolis, Indiana, are an original and four copies of its comments in the above-referenced rulemaking proceeding.

Should there be any questions with regard to these comments, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

cc(w/enc): James A. Hudgens
Office of Plans and Policy

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 76.51)
of the Commission's Rules)
to Include Marion, Indiana)
in the Indianapolis-Bloomington,)
Indiana Television Market)

MM Docket No. 93-260

To: Chief, Mass Media Bureau

COMMENTS OF VIDEOINDIANA, INC.

VideoIndiana, Inc., licensee of Station WTHR(TV), Indianapolis, Indiana, by its attorneys, hereby submits its comments in this rulemaking. The Commission's Notice of Proposed Rulemaking asks for comments on the petition of Marion T.V., Inc., licensee of station WMCC-TV, Marion, Indiana, to amend Section 76.51 of the Commission's Rules by adding Marion, Indiana to the Indianapolis-Bloomington, Indiana television market. For the reasons set forth below, VideoIndiana strongly opposes adding Marion as a hyphenated market with Indianapolis and Bloomington.

WMCC-TV has failed to demonstrate that the proposed market expansion is warranted. The Commission has considered four factors in evaluating past requests for modification of television market designations: (1) the distance between the designated communities and the community that would be added to the market designation; (2) whether the modification would expand the cable

carriage rights of the subject station beyond its Grade B coverage area; (3) a clear showing of a particularized need for the modification by the subject station; and (4) a showing of benefit to the public from the proposed change. Major Television Markets (Rome-Atlanta, Georgia), 7 FCC Rcd. 8591 (1993); Television Muscle Shoals, Inc., 48 RR 2d 1191 (1980), recon. denied, 87 FCC 2d 507 (1981) ("Muscle Shoals"). WMCC-TV does not refer to these criteria or even acknowledge the need to satisfy them. It thus fails to make the factual showing required for hyphenation.

A. The Great Distances Between Marion and the Communities in the Existing Market Weigh Against Hyphenation.

Marion, Indiana is far from the communities in the market at issue here. Marion is fully 72 miles from Indianapolis and approximately 120 miles from Bloomington.^{1/} WMCC-TV would create a market, for purposes of defining a local station and applying the Commission's programming exclusivity rules, which extends 35 miles out from each of these three cities. Because Marion and Bloomington are virtually in opposite directions from Indianapolis, this would create a market which would be as great as 190 miles wide.

Such a drastic expansion of a market would be unprecedented, and in fact finds no support under prior hyphenation cases. In

^{1/} Rand McNally, 1993 Road Atlas, at 32-33. WMCC-TV asserts that Marion is 58 miles from Indianapolis, but does not indicate how it calculated that figure. (Petition at 8.) Its argument that this case is similar to other hyphenation grant cases (Id.) is premised on an understated distance figure and is thus invalid.

Muscle Shoals, a similar distance of 75 miles between two Georgia communities was found to be too great, and hyphenation was denied. Compare Major Television Markets (Fresno-Visalia, California), 57 RR 2d 1122 (adding Visalia, Hanford and Clovis to the Fresno market where communities were only 10, 30 and 35 miles from Fresno respectively).^{2/} Marion is actually closer to the larger market and city of Fort Wayne than it is to Indianapolis.^{3/}

B. Inclusion of Marion in the Indianapolis-Bloomington Market Would Impermissibly Expand WMCC-TV's Rights Far Beyond its Grade B and 35-Mile Contours.

The second factor considered by the Commission in evaluating proposals to amend market designations, whether the proposed community's station would expand its carriage rights beyond its existing contours, also warrants rejecting WMCC-TV's proposal.

WMCC-TV asserts that "WMCC-TV serves the same area as the other ADI stations." (Petition at 5.) This is not correct. There is little overlap between WMCC-TV and three of the stations in the market which are licensed to Bloomington, WCLJ, WIIR and WTTV.^{4/} WMCC-TV's Grade B contour falls far short of including all of the existing market; indeed WMCC-TV acknowledges that it

2/ In Major Television Markets (Orlando-Daytona Beach), 102 FCC 2d 1062 (1985), the Commission (in a split decision) hyphenated markets which were 75 miles away, but in that case there was no additional, far more distant market as is the case with Bloomington here.

3/ Rand McNally Road Atlas, supra, n. 1. Marion is 57 miles from Fort Wayne but 72 miles from Indianapolis.

4/ Television and Cable Factbook, TV Stations 1993, at A-447 through A-455.

covers less than half of the ADI. (Petition Ex. 2 Table 2.) WMCC-TV's Grade B contour fails to reach Bloomington or any parts of at least 11 counties in the ADI. In addition, only three of the eight stations licensed to the market cover Marion with a Grade B contour.^{5/} WMCC-TV's "local" area would be significantly expanded beyond its Grade B coverage area, the same fact that contributed to denial of hyphenation in Muscle Shoals, 48 RR 2d at ¶ 10. There is insufficient overlap here to support hyphenation.^{6/}

WMCC-TV's argument that hyphenation will not "unduly burden local cable systems" misses the fact that the major market list is also used to determine programming exclusivity rights. Indeed in the rulemaking implementing the Cable Act of 1992, the Commission decided against wholesale changes in the major market list in part because of concerns as to the "significant implications" of such an approach on its program exclusivity rules.^{7/} In previously adopting those exclusivity rules, the Commission selected a 35-mile zone around hyphenated communities to circumscribe exclusive programming rights, and rejected proposals that would have granted stations broader "local" zones, such as 50 miles or coextensive

^{5/} Factbook, supra n. 4.

^{6/} These facts distinguish the present request from previous hyphenation requests which were granted. See, e.g., Fresno-Visalia, supra, and Orlando-Daytona Beach, supra.

^{7/} Report and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket Nos. 92-259 et al., FCC 92-144, at ¶ 50.

with the ADI.^{8/} WMCC-TV's 35-mile zone covers only part of Indianapolis's zone and does not come close even to reaching the 35-mile zone of Bloomington.^{9/} Hyphenating Marion into the Indianapolis-Bloomington market would improperly create a huge geographic market as much as 190 miles wide for purposes of program exclusivity, creating rights that go well beyond stations' service contours.

C. WMCC-TV Has Provided No Evidence of Public Benefit.

The Commission has required that parties seeking to expand a major television market demonstrate the public benefit to be derived from such a change. Muscle Shoals at ¶ 9; Orlando at ¶ 19. WMCC-TV has neither alleged that such a benefit is to be gained from hyphenating Marion into the Indianapolis-Bloomington market nor provided any supporting evidence.^{10/}

8/ Program Exclusivity in the Cable and Broadcast Industries, 64 RR 2d 1818, 1845-46 (1988), on recon., 66 RR 2d 44 (1989).

9/ Cable & Station Coverage Atlas, Map 127.

10/ WMCC-TV points out that its transmitter is located 28 miles from Indianapolis. This site may have enabled WMCC-TV to gain coverage over part of Indianapolis and claim it is an Indianapolis station, while still managing to place the required city-grade signal over its community of license. But it is irrelevant to a market hyphenation petition. (WMCC-TV incorrectly cites Atlanta-Rome for the proposition that "close" transmitter sites would support hyphenation, but that was only a rulemaking proposal, not a determination that hyphenation should be granted. Moreover, its only discussion on the point was to a case where the Commission said that the absence of co-location would not be fatal to a hyphenation petition.) The issue here is not where WMCC-TV's transmitter is, but whether its community of license is "common" to the other markets. Marion is not.

WMCC-TV heavily relies on the fact that Marion is part of the same ADI as these communities. But the Commission has repeatedly held that the mere fact that communities are contained within the same ADI is insufficient evidence to justify their hyphenation. Orlando-Daytona Beach, supra, at 1071.

WMCC-TV claims that the Commission should correct an "historical anomaly" caused by the fact that it began operating after the original list of markets was adopted. (Petition at 2-3.) But the Commission has never granted hyphenation based on this claim. Were it to do so, every station which had commenced operation after 1970 would be automatically entitled to have its community hyphenated into a larger market. Instead, the Commission has maintained an approach that considers the merits of each request individually.

In the rulemaking to implement the must carry and market definition provisions of the Cable Act of 1992, parties asked the Commission for the very relief WMCC-TV now requests -- to expand markets to match ADI definitions. But the Commission expressly rejected that approach:

Wholesale changes in or reranking the markets on the list would have significant implications for copyright liability and for the Commission's broadcast and cable program exclusivity rules. We are not prepared to make such changes on the present record. Therefore, at this time, we will only update the existing list by adding those designated communities requested by parties providing specific evidence that change to a particular market is warranted.^{11/}

^{11/} Report and Order, supra n. 7, at ¶ 50.

In that same Report and Order, the Commission stated that modification of market designations may be appropriate where there was evidence of "commonality between the proposed community to be added to a market designation and the market as a whole." Id. at ¶ 50. There is no evidence that such commonality exists with respect to Marion and Indianapolis-Bloomington. For example, WMCC-TV does not claim that it has a substantial audience in the Indianapolis or Bloomington viewing areas that would indicate a public interest in its programming.

WMCC-TV states that its primary interest is to become a "local" signal under the copyright royalty law. Rather than amending a Commission rule affecting an entire market, the more appropriate process is for WMCC-TV to demonstrate it is "significantly viewed" in the market as set forth in Section 76.54 of the Commission's Rules. WMCC-TV, however, has apparently never attempted to establish that it is "significantly viewed" in the counties containing and adjacent to Indianapolis and Bloomington. As the Commission stated when it first issued the major television market list, "Stations with no significant audience in a market may logically be treated as distant signals."^{12/} Only distant stations with significant over-the-air audience in the market should be treated as local. WMCC-TV has not demonstrated any viewing levels and thus cannot demonstrate any public need.^{13/}

^{12/} Cable Television Report and Order, 36 FCC 2d 143, 174 (1972).

^{13/} While WMCC-TV attaches TV Guide program listings, it fails to demonstrate why this is at all relevant to a hyphenation request.

CONCLUSION

WMCC-TV has failed to make the necessary showing to amend Section 76.51. Hyphenating Marion into the Indianapolis-Bloomington major television market is not warranted under existing precedent, and would create a drastically expanded market which would grant WMCC-TV carriage and exclusivity rights that extend far beyond its own coverage area. Its petition should be denied.

Respectfully submitted,

VIDEOINDIANA, INC.

By John T. Scott, III
John T. Scott, III

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Its Attorneys

Dated: November 4, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of November, 1993, caused a copy of the foregoing "Comments of VideoIndiana, Inc." to be sent by first-class mail, postage prepaid, to the following persons:

Reed Miller
Marcia Cranberg
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

John T. Scott, III
John T. Scott, III